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No. [illegible]

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

T. E. BUTTLES, as Tax Collector of Fulton County, Georgia, W. COMER DAVIS, REESE PERRY and JOHN C. TOWNLEY, as Members of the Board of Tax Assessors of Fulton County, Georgia.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA AND SUPPORTING BRIEF

Dan MacDougald,
[illegible]
[illegible]
Attorneys for Petitioner.

Of Counsel:
MacDougald, Troutman & Arkwright,
Atlanta, Georgia.

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Cases and Text Cited

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 653

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

T. E. SUTTLES, AS TAX COLLECTOR OF FULTON COUNTY, GEORGIA, W. COMER DAVIS, REESE PERRY AND JOHN C. TOWNLEY, AS MEMBERS OF THE BOARD OF TAX ASSESSORS OF FULTON COUNTY, GEORGIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA AND SUPPORTING BRIEF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Northwestern Mutual Life Insurance Company, respectfully prays that a writ of certiorari issue to the Supreme Court of the State of Georgia to review a final judgment of that court entered the 27th day of July, 1946. A certified transcript of the record in the case, including the proceedings in the Supreme Court of the

State of Georgia, accompanies this petition, in accordance with the rules of this Court.

I

Summary and Short Statement of Matter Involved

This petition involves the questions of whether the Supreme Court of Georgia has deprived petitioner of its rights under the due process and equal protection clauses of the Federal Constitution in holding (1) that certain credits secured by real estate in Fulton County, Georgia, had acquired a business situs in that County so as to be subject to *ad valorem* taxation therein, and (2) that petitioner had not been the victim of an intentional and systematic discrimination by officials of Fulton County, Georgia, in the assessment of said credits for *ad valorem* taxation.

The questions arose in a petition in equity filed by petitioner, Northwestern Mutual Life Insurance Company, in the Superior Court of Fulton County, Georgia, against T. E. Suttles, as Tax Collector, and Comer Davis, et al, as the Board of Tax Assessors of Fulton County, Georgia (R. 27). Petitioner sought to enjoin the collection of *ad valorem* taxes on certain mortgage credits owned by petitioner, a non-resident corporation, for the years 1931 to 1937 inclusive, on the ground that such credits had not acquired a situs for taxation in Fulton County, Georgia, and the collection of *ad valorem* taxes thereon would deprive petitioner of its property, contrary to the due process and equal protection clauses of the Constitution of the United States and of the Constitution of the State of Georgia. The defendants in their answer claimed the credits arose out of a loan business conducted in Fulton County, Georgia, and by reason thereof had acquired a local business situs so as to make such credits taxable (R. 41).

On the first trial of the case in the lower court, a decree was entered in favor of petitioner. On appeal, the Supreme Court of Georgia reversed the lower court and ordered a new trial, holding the evidence established that the credits were a part of a local loan business conducted in Fulton County, Georgia (R. 2-27).

In advance of the second trial of the case, petitioner by a series of amendments alleged that the defendants in making the assessments in question had been guilty of a systematic and intentional discrimination against petitioner, in violation of the equal protection and due process clauses of the Federal and State Constitutions (R. 54, 86, 102, 107) for that assessments were made against petitioner but not against the majority of owners of intangible personal property, and, in addition, petitioner was assessed at 30% of value for seven years, while others were assessed at 25% for only three years.

On the second trial, a verdict was directed by the lower court against petitioner and in favor of defendants on the issue of discrimination as well as taxability. On appeal by petitioner, the Supreme Court of Georgia affirmed the lower court (R. 269, 295, 304, 317, 324) and subsequently denied three motions for rehearing. On the issue of taxability, the Georgia Supreme Court held the evidence was substantially the same at the second trial as at the first, and it would adhere to its decision on the first appeal. On the issue of discrimination, the court held the evidence was insufficient to permit the question to go to a jury.

On the issue of taxability, the facts are not in dispute. Petitioner is a corporation of the State of Wisconsin, with its principal office in Milwaukee, Wisconsin, where it has for many years engaged in business as a mutual life insurance company. In maintaining its reserve against insurance contracts issued, petitioner has lent money on

the security of real estate. These loans have been made as follows:

Functions Performed in Milwaukee

The sole right to determine whether or not an application for a loan would be accepted or rejected and the terms on which a loan would be made, was vested in and performed by a Finance Committee of eight persons at the Company's home office in Milwaukee, Wisconsin. A loan department in Milwaukee, consisting of from 200 to 250 employees, was maintained, which handled the loan business of the Company with the exception of legal matters and the action of the Finance Committee, both of which also occurred in Milwaukee. The Loan Department in Milwaukee appointed and supervised the activities of the agents of the Company in the field, who were solicitors of loans and designated as "loan agents." Upon receipt of an application for a loan, the Department prepared an analysis for the Finance Committee and in some instances, obtained supplemental credit information. It presented the application together with its recommendations to the Finance Committee in Milwaukee, and transmitted the latter's decision to the loan agent in the field for delivery to the applicant. Upon receipt of an abstract of title prepared by applicant's attorney, this was passed on by the Legal Department in Milwaukee, which Department also drew all notes, security deeds, assignment of leases and other papers required, and passed on the sufficiency of their execution by the borrower. The Loan Department kept all notes, security deeds, and other papers in Milwaukee. It kept up with all maturities, sent out notices, and made all collections. It kept up with taxes and insurance and sent notices to the borrower. All funds available for lending were kept in Milwaukee and were disbursed by check to the borrowers.

Functions Performed in Fulton County, Georgia

The loan-soliciting agent of the Company in Georgia since 1900 was E. M. Durant, designated as "loan agent". He maintained an office in Fulton County, Georgia, on which he paid rent but for which he was reimbursed by the Company. He solicited written applications for loans to be made by the Company, and in 1931 there were 19 loans on property in Fulton County, Georgia, still outstanding, all made before 1928. Durant had solicited no new applications since 1928. Prior to 1928, it had been his practice to obtain written applications for loans on forms addressed to the Finance Committee which he would transmit to Milwaukee along with his opinion as to the moral character of the applicant and the value of the proffered security. He had no authority to make any loans at any time, but such power was vested solely in the Finance Committee in Milwaukee, whose decision was usually sent to him and he in turn advised the applicant. If favorable, he obtained from applicant an abstract of title prepared by applicant's attorneys and sent it to Milwaukee. The loan papers were prepared in Milwaukee and sent to him and he arranged for their execution. After execution, he returned them to Milwaukee, and if satisfactory to the Loan Department, the check payable to borrower and the security deed were sent to him. He delivered the check, had the security deed recorded and then returned it to Milwaukee. Loan renewals were handled in a similar manner. He would receive insurance policies if he knew the insuring companies were acceptable to the Loan Department. At one time, maturity notices were sent direct to the borrower. At another time, these notices were sent to Mr. Durant for transmission to the borrower. He did not handle the collection of interest or principal on

the loans, but if a borrower's check were sent to him, he merely forwarded it to Milwaukee. When a loan became in default, the Loan Department in Milwaukee would usually ask him to contact the borrower to see if the default could not be cured. Durant had no money to lend on behalf of the Company. He made no decisions as to the acceptance or rejection of loans. His functions were purely ministerial and involved no element of judgment or management, and consisted mostly in getting the borrower to do what he had already agreed to do.

In 1933 Durant took over the management of the Arcade Building in Fulton County, on which the Company held a loan, belonging to the Flynn Realty Company, and was subsequently appointed Receiver. This property was later returned to the owners.

During the period in question, the Company had no other agents than Durant in Fulton County, Georgia, who had any connection with the solicitation of applications for loans in Fulton County, Georgia, or with the making of loans to residents of Fulton County, Georgia.

It was established by the evidence that, as a general practice, companies engaged in lending money from a central office to borrowers over a wide territory handled the solicitation of applications for loans, which were to be submitted to the Home Office, to be there accepted or declined, by one of three methods, (1) brokers or borrowers submitted applications, (2) the lending company appointed correspondents who were independent agents and who solicited and submitted applications, and (3) the lending company employed salaried agents to solicit and submit applications. The actual functions performed in each case were approximately the same. Your petitioner employed the third method.

On the issue of discrimination, the Supreme Court of Georgia affirmed the lower court's direction of a verdict

against petitioner on the ground that there was insufficient evidence in support of the alleged discrimination to let the matter be passed on by the jury. The evidence showed:

During the period in question, 1931-37, all property including intangibles was required by Georgia law to be assessed for *ad valorem* taxation at 100% of its value. As a result, few owners of intangibles returned such intangibles for taxation and only a small percentage of such property was ever assessed. In 1935, a drive was made by the taxing authorities of Fulton County, Georgia, and other public-minded groups to get such intangibles returned for taxation. The tax authorities agreed to accept such property on the basis of cash 5%, stocks and bonds 15%, and mortgages 25%, and to forgive all taxes, interest and penalties for the seven prior years (the period of the statute of limitations). Some owners of intangibles took advantage of this offer, but the great majority did not.

On December 27, 1937, the Georgia Intangible Tax Act was enacted (Ga. Laws, 1937-38 Ex. Sess. p. 156, Ga. Ann. Code § 92-114, et seq.) to provide a new method of taxing intangibles on an *ad valorem* basis. It provided that persons making returns under the Act in 1938 would not be required to pay any *ad valorem* taxes on intangibles for prior years,

> ". . . on which no return or assessment has been made or on which no litigation has been instituted either by the taxing authorities or the taxpayer prior to January 1, 1938."

The provision just quoted was construed by the defendants, the taxing authorities of Fulton County, Georgia, as giving them the right to make any assessments they saw fit between December 27, 1937 and January 1, 1938, and that such assessments would be excepted from the short statute of limitations contained in the statute. They selected a

small number of owners of mortgage credits, 51 in number and mostly non-residents, and a small number of owners of stocks and bonds, 63 in number, against whom assessments were made, but they ignored both then and in the subsequent years the vast majority of the holders of intangibles who had not paid any *ad valorem* taxes on their intangibles.

Under the new Intangible Tax Act, owners of intangibles began making returns and the number of taxpayers making such returns and the amount of intangibles returned increased tremendously.

One of the defendants, W. Comer Davis, testified that the assessors felt they had covered the intangible picture and had "scraped the barrel" in an effort to collect intangible taxes, yet the evidence showed no effort to make assessments against other holders of intangibles who had not returned the same for the period 1931-37, even though the names of a large number of holders of intangibles became available under the Intangible Tax Act.

There was no dispute in the evidence that petitioner had been assessed at 30% of value for seven years, while others had been assessed at 25% for only three years.

II

Jurisdiction of This Court

The basis of this Court's jurisdiction is Section 237(b) of the Judicial Code (28 U.S.C.A. §344(b)). The judgment of the Supreme Court of Georgia sought to be reviewed was entered finally on July 27, 1946, when petitioner's third motion for a rehearing was denied (R. 324); and this petition is filed within three months from the date of that judgment.

The question involved is substantial because the amount of taxes, interest and penalties which petitioner would be required to pay if the assessments in question are upheld is

approximately $287,000.00 The assessments represent a departure from the policy of the taxing authorities of Fulton County, Georgia, in that at no time in the 37 years prior thereto had the attempt been made to subject to *ad valorem* taxation mortgage credits owned by non-resident insurance companies where the money had been loaned from the home office of such companies on the security of property located in Fulton County, Georgia. The assessments represent an attempt to hold petitioner liable for *ad valorem* taxes, not only for the year 1937, in which the assessments were made, but for six years prior thereto.

The question is not only of importance to petitioner, but to other non-resident owners of mortgage credits secured by real estate in Fulton County, Georgia, for the period in question and for the years subsequent thereto, who are involved in litigation with the taxing authorities of Fulton County contesting the validity of similar assessments. A ruling by this Court in this case would not only decide the constitutional questions here presented, but would likewise contribute substantially toward the decision of such questions involved in the other cases now pending. Jurisdiction of this Court to review the federal questions decided by the Supreme Court of Georgia is sustained by the following cases:

As to taxability:

Union Refrigerator Transit Co. v. *Ky.*, 199 U. S. 194;
Safe Deposit & Trust Co. v. *Virginia*, 280 U. S. 83;
Buck v. *Beach*, 206 U. S. 392;
Frick v. *Pennsylvania*, 268 U. S. 473;
Wheeling Steel Corp. v. *Fox*, 298 U. S. 193.

As to discrimination:

Cumberland Coal Co. v. *Board*, 284 U. S. 23;
Iowa-Des Moines Nat. Bank v. *Bennett*, 284 U. S. 239;
Sioux City Bridge Co. v. *Dakota County, Nebraska*, 260 U. S. 441;

Township of Hillsborough v. *Doris Duke Cromwell* (Jan. 28, 1946), 326 U. S. 620.

How and When the Federal Question Was Raised

The federal question as to taxability was raised in petitioner's complaint (R. 27). It was urged at the first trial and decided by the lower court in favor of petitioner. It was argued before the Supreme Court of Georgia on the first appeal and decided by that court adversely to petitioner's contentions (R. 2-27). It was urged at the second trial and decided by the lower court adversely to petitioner's contentions. It was urged before the Supreme Court of Georgia on the second appeal and that court considered this federal question and decided it adversely to petitioner's contention (R. 269-294). It was urged in the several motions for rehearing filed by petitioner (R. 295, 304, 317) which motions were overruled.

The federal question as to discrimination was raised in amendments to petitioner's complaint (R. 54, 86, 102, 107). It was urged at the second trial and decided by the lower court adversely to petitioner's contentions. It was urged before the Supreme Court of Georgia on the second appeal and that court considered this federal question and decided it adversely to petitioner's contention (R. 269-294). It was urged in the several motions for rehearing filed by petitioner (R. 295, 304, 317) which motions were overruled.

III

The Questions Presented

1. Does the decision and judgment of the Georgia Supreme Court holding that certain credits secured by real estate in Fulton County, Georgia, and owned by petitioner, a non-resident corporation, had acquired a business *situs*

in that county so as to be subject to *ad valorem* taxation therein, deprive petitioner of its rights under the due-process and equal protection of the law clauses of Section 1 of the Fourteenth Amendment to the Federal Constitution?

2. Does the decision and judgment of the Georgia Supreme Court holding that the taxing officials of Fulton County, Georgia, in the assessments against petitioner of credits secured by real estate in Fulton County, Georgia had not been guilty of an intentional and systematic discrimination against petitioner, deprive petitioner of its rights under the due process and equal protection of the law clauses of Section 1 of the Fourteenth Amendment to the Federal Constitution?

IV

Reasons Relied On for the Allowance of the Writ

1. The Georgia Supreme Court in violation of the due process and equal protection clauses of Section 1 of the Fourteenth Amendment to the Federal Constitution, has (a) found that the credits secured by real estate in Fulton County, Georgia, and owned by petitioner, a non-resident of Georgia, had a taxable *situs* in Georgia because they arose out of and were integrated with a business of lending money conducted by petitioner in Fulton County, and (b) found that there had been no intentional and systematic discrimination against petitioner in the making of the assessments in question.

2. The undisputed evidence shows that petitioner's mortgage credits had no taxable situs in Fulton County, Georgia, and there is no basis in law or in fact for the holding of the Georgia Supreme Court to the contrary. The mortgage credits arose out of the business of lending money conducted in Milwaukee, Wisconsin, where all responsibility, authority

and management were exercised. There had been no localization of any money-lending business in Georgia, and the activities of the employee Durant in Georgia either prior to or during the period in question, 1931-1937, were insufficient to constitute the carrying on of a lending business in Fulton County, as such activities consisted only of transmitting applications for loans or applications for renewals and papers in connection therewith and taking such steps to protect the security and ultimate collection of the loans as the Milwaukee office directed.

3. The decision of the Georgia Supreme Court on the taxability of the mortgage credits in question is in conflict with its own decisions in

Suttles v. *Associated Mortgage Companies,* 193 Ga. 78, 17 S. E. (2) 272;

National Mortgage Corporation v. *Suttles,* 194 Ga. 768, 22 S. E. (2) 386;

Davis v. *Metropolitan Life Ins. Co.,* 196 Ga. 304, 26 S. E. (2) 618;

wherein the Georgia Supreme Court held that a non-resident owner of credits secured by real estate in Georgia was not taxable in Georgia thereon because of the use of brokers or loan agents to solicit and transmit written applications for loans to non-resident, inspect properties or deliver checks or because of the maintenance of an office or agents in Georgia to protect the collection or liquidation of the loans, these being precisely the same functions performed by petitioner's agent in Fulton County, Georgia.

4. The assessment of petitioner on its mortgage credits and the failure to assess the great majority of the owners of intangible property located in Fulton County, Georgia, and also the assessment of petitioner at 30% of value for

each of seven years, while others were assessed at 25% for only three years, was the result of an intentional and systematic discrimination against petitioner.

5. The Georgia Supreme Court has decided federal questions in a way probably not in accord with applicable decisions of this Court. The effect of the Georgia court's decisions in this case is that the mere maintenance of a salaried employee in a State, with no control over the lending of money and no authority to lend money, is sufficient to impose a taxable *situs* on intangibles notwithstanding the fact that such intangibles arose out of business actually conducted at the home office in another State. Some of the decisions of this Court with which the above holding is in conflict are:

Union Refrigerator Transit Co. v. *Ky.*, 199 U. S. 194;
Safe Deposit & Trust Co. v. *Virginia*, 280 U. S. 83;
Buck v. *Beach*, 206 U. S. 392;
Frick v. *Pennsylvania*, 268 U. S. 473;
Wheeling Steel Corp. v. *Fox*, 298 U. S. 193.

The effect of the decision of the Georgia Supreme Court as to discrimination is to permit one taxpayer to be treated differently from another taxpayer, merely because one of the taxing officials, contrary to the testimony of his predecessor, said that the taxing authorities had really meant to treat all alike. That ruling appears to be in conflict with the following decisions of this Court:

Cumberland Coal Co. v. *Board*, 284 U. S. 23;
Iowa-Des Moines Nat. Bank v. *Bennett*, 284 U. S. 239;
Sioux City Bridge Co. v. *Dakota County, Nebraska*, 260 U. S. 441.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court, directed to

the Supreme Court of the State of Georgia, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Supreme Court of Georgia had in the case numbered and entitled on its docket, No. 15427, *Northwestern Mutual Life Insurance Company, Appellant,* v. *T. E. Suttles, as Tax Collector of Fulton County, Georgia, W. Comer Davis, Reese Perry and John C. Townley, as members of the Board of Tax Assessors of Fulton County, Georgia, Appellees;* and a full and complete transcript of the record and of the proceedings of the said Supreme Court of Georgia had on the first appeal of the controversy between the parties in case numbered 13904, entitled on its docket *T. E. Suttles, as Tax Collector of Fulton County, C. H. Gullatt, Reese Perry and Comer Davis, Appellants,* v. *Northwestern Mutual Life Insurance Company, Appellee,* to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States and that the judgment of said Supreme Court of Georgia be reversed, and for such other relief as to this Court may seem proper.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
By DAN MACDOUGALD,
ROBERT S. SAMS,
DUDLEY COOK,
Atlanta, Georgia,
Attorneys for Petitioner.

Of Counsel:

MACDOUGALD, TROUTMAN & ARKWRIGHT,
Atlanta, Georgia.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Supreme Court of Georgia is reported in 38 S. E. (2d) 786, and appears in the Record at pages 269-294. The opinion of the Supreme Court of Georgia on the first appeal in this case is reported in 193 Ga. 495, 19 S. E. (2d) 396, 21 S. E. (2d) 695, 143 A. L. R. 343, and is set out in the Record at pages 2-26.

Jurisdiction

A full statement of the grounds on which it is claimed that this Court has jurisdiction is contained in Section II of the petition for writ of certiorari, and the same is hereby adopted and made a part of this brief.

Statement of the Case

The facts in this case are set out in Section I of the petition for writ of certiorari, and the statement there made is hereby adopted and made a part of this brief.

Specifications of Errors

The Supreme Court of Georgia erred in holding that the mortgage credits owned by petitioner and secured by real estate in Fulton County, Georgia had acquired a business *situs* in that County so as to be subject to *ad valorem* taxation therein, and in holding that the evidence failed to establish an intentional and systematic discrimination against petitioner by officials of Fulton County, Georgia, in the assessment of said credits for *ad valorem* taxation. In its decision the Supreme Court of Georgia has deprived petitioner of its rights under the due process and equal

protection clauses of Section 1 of the Fourteenth Amendment to the Federal Constitution.

Summary of Argument

A synopsis of the argument is set forth in the index and for the sake of brevity is omitted here.

Argument

As to Taxability

The applicable principles of law are well settled by decisions of this Court. These principles have likewise been announced and followed by the Supreme Court of Georgia in a number of decisions. While the Georgia Supreme Court has set forth these principles in its opinion in this case, it has failed to apply them to the undisputed facts. An outline of the applicable principles follows:

A State may not impose an *ad valorem* tax on property not within its borders. Any attempt to do so would be in violation of Section 1 of the Fourteenth Amendment to the Federal Constitution (and of Article I, §1, ¶3 of the Georgia Constitution).

Intangible property, including mortgage credits, has a taxable *situs* only at the domicile of the owner, unless such intangibles are a part of a business conducted by the owner in a State other than his domicile, in which case the intangibles are said to have acquired a business *situs* away from the owner's domicile and in the jurisdiction where the business is conducted.

For intangibles to acquire a business situs away from the owner's domicile they must be integrated with, or a substantial part of, a local business. They must have arisen out of such a local business or have been detached

from the business conducted at the domicile and made a part of the local business.

In determining whether intangibles have acquired a business *situs* away from the owner's domicile, it is essential that they be used in an established business and be under the managment of an agent with authority and control over such intangibles. The mere presence of an employee in the taxing jurisdiction is insufficient to authorize the taxing of intangibles unless such employee manages a local business of which such intangibles are an integral part. The test is whether or not the non-resident occupies the corresponding situation to that of a resident. The intangibles must be part of a business which has been localized in a jurisdiction other than that of the owner.

The above principles have been announced in many decisions of this Court, including the following:

New Orleans v. *Stempel,* 175 U. S. 309;
Bristol v. *Washington County,* 177 U. S. 133;
Liverpool & London & Globe Ins. Co. v. *Board of Assessors,* 221 U. S. 346;
Assessors v. *Comptoir National,* 191 U. S. 388;
Metropolitan Life Ins. Co. v. *New Orleans,* 205 U. S. 395;
Farmers Loan & Trust Co. v. *Minn.,* 280 U. S. 204;
Wheeling Steel Corpn. v. *Fox,* 298 U. S. 193;
First Bank Stock Corpn. v. *Minn.,* 301 U. S. 234, 238;
Newark Fire Insurance Co. v. *State Board,* 307 U. S. 313, 319;
Curry v. *McCanless,* 307 U. S. 357, text 368, 381.

An excellent summary of these principles is contained in the *Wheeling Steel Corporation* case, *supra.*

These principles have likewise been announced many times by the Georgia Supreme Court. Some of these cases are:

Collins v. *Miller*, 43 Ga. 336;
Carhart v. *Paramore*, 44 Ga. 262;
Cary v. *Edmondson*, 44 Ga. 651;
Armour Packing Co. v. *Savannah*, 115 Ga. 140, 41 S. E. 237;
Armour Packing Co. v. *Augusta*, 118 Ga. 552, 45 S. E. 424;
Armour Packing Co. v. *Clark*, 124 Ga. 369, 52 S. E. 145;
Columbus Mutual Life Ins. Co. v. *Gullatt*, 189 Ga. 747, 8 S. E. 2d 72;
Suttles v. *Associated Mtg. Cos.*, 193 Ga. 78, 17 S. E. 2d 272;
National Mortgage Corpn. v. *Suttles*, 194 Ga. 768, 22 S. E. 2d 386;
Davis v. *Metropolitan Life Ins. Co.*, 196 Ga. 304, 26 S. E. 2d 618;
Davis v. *Penn Mutual Life Ins. Co.*, 198 Ga. 550, 551. 32 S. E. 2d 180,

and particularly in the first opinion in the instant case, 193 Gl. 495, 19 S. E. 2d 396, 21 S. E. 2d 695 (R. 2-26).

This Court in the *Wheeling Steel Corporation* case, *supra*, after referring to developments with reference to the taxation of tangible property so that it is now taxable in the place where it is kept and used, said:

> "There has been an analogous development in connection with intangible property by reason of the creation of choses in action in the conduct by an owner of his business in a State different from that of his domicile . . . These cases, we said in Farmers Loan & T. Co. *v.* Minnesota, supra (280 U. S. p. 213, 74 L. ed.

375, 50 S. Ct. 98, 65 A. L. R. 1000), 'recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business.' We adverted to this reservation in Beidler *v.* South Carolina Tax Commission, supra (282 U. S. p. 8, 75 L. ed. 133, 51 S. Ct. 54), and in First Nat. Bank *v.* Maine, supra (284 U. S. p. 331, 76 L. ed. 321, 52 S. Ct. 174, 77 A. L. R. 1401)."

The Georgia Supreme Court in the recent case of *Davis* v. *Penn Mutual Life Insurance Company, supra,* held in headnotes 1 and 2 as follows:

> "1. The determining factor in the taxability of intangibles, as of tangibles, is territorial jurisdiction of the taxing sovereignty. The want of power to tax property outside the territorial jurisdiction is an inherent limitation on the power to tax. This State, having no external sovereignty under our Federal system, cannot exercise jurisdiction or authority over persons or property without its territory, and 'cannot tax where it has jurisdiction over neither the owner nor the property.' To do so would violate the due-process clause of our State constitution.
>
> "2. 'According to previous decisions by this court construing Georgia statutes, a promissory note executed by a resident of this State, but owned by a non-resident and held by him at his domicile out of this State, is to be taxed here only if it is derived from or is used as an incident of property owned or of a business conducted by the non-resident or his agent in Georgia; and this is true although the note may be secured by a mortgage on land situated in this State.' "

The rule that intangibles arising out of the relationship of debtor and creditor are subject to an *ad valorem* tax is based upon the substantial fact that the property in the debt is in the creditor. The debtor has no property in his debt. As to him, it is a liability and not an asset and in

consequence the existence of the debt cannot support a tax based on the value thereof to him.

Before intangibles can be said to have become localized or associated with a local business in a jurisdiction different from that of the domicile of the owner, it is essential that they arise from the conduct of a local business or be employed in the conduct of such local business by the non-resident owner.

The rule is of universal application that the same factual situation must exist as to the business conducted by a non-resident as exists when a similar business is conducted by a resident to localize the tax *situs* of the intangibles arising therefrom or employed therein by the non-resident.

Wheeler v. *Sohmer, Comptroller of State of New York*, 233 U. S. 434.

State of Iowa v. *Slimmer, et al.*, 248 U. S. 115, 120;

DeGanay v. *Lederer, Collector of Internal Revenue*, 250 U. S. 376;

Shaffer v. *Carter, State Auditor, et al.*, 252 U. S. 37;

Safe Deposit & Trust Co. v. *Virginia*, 280 U. S. 83;

Farmers Loan & Trust Co. v. *Minnesota*, 280 U. S. 204;

Baldwin, et al. v. *Missouri*, 281 U. S. 586;

Beidler, et al. v. *South Carolina Tax Commission*, 282 U. S. 1;

Nickey, et al. v. *Mississippi*, 292 U. S. 393;

Senior v. *Braden*, 295 U. S. 422, 423;

Manufacturers Trust Co. v. *Hackett*, 170 Atl. 792 (Conn.);

Jamison v. *Commonwealth*, 90 S. E. 640 (Va.);

Tax Commissioner v. *Kelly-Springfield Tire Co.*, 175 N. E. 700 (Ohio);

W. W. Kimball Co. v. *Board of Commissioners*, 161 Pac. 644 (Kan.);

Westinghouse Elec. & Mfg. Co. v. *Los Angeles Co.*, 205 Pac. 1076 (Calif.).

In the *Kelly-Springfield* case, *supra*, the court holds as follows:

> "Considering the particular facts of the present case, we conclude that the agency maintained in Cuyahoga County by the Kelly-Springfield Tire Company is not an independent business, nor an independent branch of the principal business of said company, and while it is true that the local sales agency is doing business on a fairly large scale, it is doing so through the immediate control and management of the company's home office. The Kelly-Springfield Tire Company is conducting this branch of its business through the local agency upon its general corporate capital for the general business of its central factory, and the credits sought to be taxed were at all times part of its general corporate assets."

In the case of

Kimball v. *Board of Commissioners*, 161 Pac. 644 (Kan.).

the court says:

> "That to establish an independent business *situs* generally, the element of the separation from the domicile of the owner and fairly permanent attachment to some foreign locality should appear, together with some business use of them or power of managing, controlling, or dealing with them in a business way."

In the case of

Manufacturers Trust Co. v. *Hackett*, 170 Atl. 792 (Conn.);

the court says:

> "The property or right must be localized in some independent business so that its substantial use and

value primarily attach to and become an asset of a business outside of the state of the owner's domicile and constitute, as it were, the subject-matter or stock in trade of that business."

Again quoting from the *Kelly-Springfield* case, *supra:*

"It is clear from the record in this case that there was no vesting of control and management of these credits in the local agency of the Kelly-Springfield Tire Company, and we hold that under the decisions such is necessary to the creation of a business *situs* for the purpose of taxing credits in the state where the debts arose."

The case further says:

"If we may venture to formulate a general statement of this modification of the rule (situs at domicile of owner), it would be that this can only result where the possession and control of the property right has been localized in some independent business or investment away from the owner's domicile, so that its substantial use and value primarily attach to and become an asset of an outside business. In other words, while the non-resident may own the business, the business controls and utilizes in its own operation and maintenance the credits and income thereof."

In *State of Missouri, ex rel. American Automobile Insurance Co.* v. *Gehner, City Assessor, etc., et al.,* 8 S. W. 2d 1057 (Mo.), 59 A. L. R. 1026, the court emphasizes the necessity of local management of the business, saying:

"So as to make debts and credits taxable in a state other than that of the domicile of the owner, they must be used in an established business, and the proceeds of that business must be under a management in such locality, with discretion in the manager as to its proceeds. Otherwise, the *situs* of such credits and debts for the purpose of taxation is the domicile of the owner."

An examination of the cases establishes that before intangibles can be held to have acquired a taxable *situs* away from the domicile of the owner, they must arise out of, or be a substantial part of, a local business conducted elsewhere, and such local business must be under the authority and control of a local manager or management so that in truth and in fact the non-resident in the jurisdiction in question is conducting a business and using therein the intangibles in question. The trend of the cases on this point is summed up in the annotation in 143 A. L. R. 361, at page 368, by the statement that a business *situs* of intangibles for the purpose of taxation in a state other than the domicile of the owner is recognized

> "only where the credits of a nonresident owner are in the possession and control of a more or less independent local agent who holds them for the purpose of transacting a permanent business and of investing and reinvesting the proceeds from the principal or interest in such a manner that the property comes in competition with the capital of the citizens of the state in which the agent resides."

Following the above statement the annotator sets forth a number of cases, including the first decision of the Georgia Supreme Court in the instant case.

The undisputed facts established in the evidence in this case fail to bring it within the exception to the general rule that intangibles are taxable at the domicile of the owner. The only activities of petitioner in Fulton County, Georgia, or in the State of Georgia were those of E. M. Durant. Mr. Durant's activities were as follows:

1. *Solicitation of applications for loans.* This activity was confined to 1928 and prior years, and did not occur during the period for which the assessments were made.

In 1931 there were only 19 outstanding loans on property in Fulton County.

2. *Serving as a channel for the transmission of papers between the Loan Department in Milwaukee and the applicants or borrowers in Fulton County, Georgia.* The papers transmitted to Milwaukee included applications for loans, abstracts of title furnished by attorneys for applicants, applications for renewals of loans, executed loan papers, and insurance policies. The papers transmitted to applicants or borrowers included the decision of the Finance Committee in Milwaukee as to the making of the loan and the terms thereof, the loan papers to be executed, checks covering loans, and in some cases, notices of maturity.

3. *Submitting his opinion as to the moral character of the applicant and the value of the proffered security.* This information was desired by the Home Office in Milwaukee in reaching a decision as to whether the loan should be made, but the Home Office frequently obtained information from other sources, such as Dun & Bradstreet and Retail Credit Company.

4. *Contacting borrowers if default occurred in the payment of the loan or taxes on the property, or in providing insurance.*

The functions of Mr. Durant in the loan business of petitioner were primarily those of a broker whose duty it was to bring the borrower and lender together. His duty was not to make loans, and he was without authority to do so.

The Georgia Supreme Court has held in other cases that

(1) where notes and mortgages are owned and held by a non-resident, secured by land in the State of Georgia, the maintenance of an office and agency in this State for the purpose merely of protecting the security and ultimate

collection or liquidation of the indebtedness, the papers themselves being sent into this State only when needed for cancellation, renewal, or foreclosure, would not be using them in this State as an incident of property owned or business conducted in Georgia. *Suttles* v. *Associated Mortgage Companies*, 193 Ga. 78, 17 S. E. 2d 272; *National Mortgage Corpn.* v. *Suttles*, 194 Ga. 768, 22 S. E. 2d 386.

(2) where a non-resident owner of credits secured by property in Georgia secured such credits through the use of intermediaries such as loan agents or brokers, using the latter as channels for the transmission of papers, relying upon their inspection of property and examination of titles, made at the borrower's instance, and forwarding the money through them also at his instance, the lender does not constitute such intermediaries as his agents to make the loan and such activities do not constitute the doing of business by the non-resident in this State. *Davis* v. *Metropolitan Life Ins. Co.*, 196 Ga. 304, 26 S. E. 2d 618.

Every activity of Durant, representing petitioner, has been covered by such decisions and each of these activities has been held to be insufficient to make the owner of the mortgage credits subject to taxation in Georgia. As already pointed out, the primary function of Durant was that of a broker. He was to bring together the applicant for loans in Georgia with the lending department of the Company located in Milwaukee, and his duties of solicitation, transmittal of papers, opinion as to the value of the security and as to renewals of the loan, insurance policies and taxes are all performed by brokers of insurance loans such as are described in *Davis* v. *Metropolitan Life Insurance Company, supra.*

Actually, after 1928 there were no new loans and none was made during the period 1931-7, inclusive. The basic

element necessary to sustain an *ad valorem* tax is the presence, actual or constructive, of the property in the taxing jurisdiction at the time covered by the assessment.

Under the decisions of the Georgia Supreme Court, the mere fact that petitioner maintained an office in Georgia which it used for the purpose of collecting or liquidating the mortgage credits, and in connection with which the papers were sent into the State for cancellation, renewal or foreclosure, would not constitute the doing of business in Georgia so as to make the mortgage credits taxable. These activities cover all the activities of Durant other than those having to do with the applications for a new loan, which took place in 1928 and prior years. Such activities in no sense were sufficient to constitute the business of lending money during the period for which the assessment was made.

It would seem the only fact on which the Georgia Supreme Court has based its decision in this case is that petitioner, instead of obtaining applications for loans through intermediaries, or brokers, whether the latter were agents of the lending company or not, employed a salaried person to perform these functions.

By contrast, these were the functions performed at the Home Office in Milwaukee:

1. The money used in the lending business conducted by petitioner was kept there.

2. The Loan Department at Milwaukee made an analysis of the proposed loan, which it submitted together with the application therefor to the Finance Committee with its recommendation as to the acceptance of the application.

3. The Finance Committee made the final decision as to the making of loans, together with the terms.

4. All papers in connection with loans were prepared and approved in Milwaukee and all legal matters were

passed on there, including the sufficiency of the title as shown by the abstract furnished by applicant's counsel.

5. All collections of principal and interest were made at Milwaukee.

6. All notices were sent from Milwaukee concerning maturity or other matters, and all bookkeeping was done there.

7. All loan papers were kept in Milwaukee.

8. The number of employees in the Loan Department in Milwaukee was 250, as contrasted with one employee in Georgia, who was for a part of the time on a part-time basis and who had no authority to make loans.

It is clear from the evidence that the mortgage credits in question did not arise out of a loan business conducted in Fulton County. There was no agent, representative or employee of petitioner in Fulton County at any time with authority to make loans, or with any money under his control to lend. The only agents of petitioner with authority to make loans on the security of real estate in Fulton County were in Milwaukee. Durant's activities were confined to solicitation of applications and serving as an intermediary for the transmission of papers and certain steps after a loan had been made looking toward the protection of the security, such as the payment of taxes and the maintenance of insurance. These activities were insufficient to constitute the localization in Fulton County of a money-lending business.

The fact that Durant was described by petitioner as a "loan agent" did not result in the localization in Fulton County of any loan business. The title given Durant is of no significance in comparison with the duties actually performed by him. His duties were no different than those of other loan brokers whose duty it was to bring the borrower and the lender together and to assist in the com-

pletion of the loan arrangements, or of agents whose purpose it was to preserve and protect the security and to accomplish the liquidation of the loans.

The holding of the Georgia Supreme Court that under the facts petitioner was engaged in a lending business in Fulton County with which the intangibles in question were integrated, constitutes a clear denial to petitioner of its rights under Section 1 of the Fourteenth Amendment to the Federal Constitution.

As to Discrimination

The equal protection clause of the Fourteenth Amendment protects a taxpayer from state action which singles him out for discriminatory treatment by subjecting him to taxes either not imposed on others of the same class or not imposed to the same degree. The right is the right to equal treatment. The treatment of others in the same class must be intentional and systematic.

Township of Hillsborough v. *Doris Duke Cromwell,* (Jan. 28, 1946), 326 U. S. 620;
Cumberland Coal Co. v. *Board,* 284 U. S. 23;
Iowa-Des Moines Nat. Bank v. *Bennett,* 284 U. S. 239;
Sioux City Bridge Co. v. *Dakota County, Nebraska,* 260 U. S. 441;
Montgomery v. *Suttles,* 191 Ga. 781, 13 S. E. 2d 781;
Phillips Petroleum Co. v. *Townsend,* 63 F. (2d) 293;
16 C.J.S. Constitutional Law, Section 502 (page 988), Section 505 (page 993).

The Georgia Supreme Court in its decision on the second appeal upheld rulings of the lower court on demurrers against petitioner and the direction of a verdict against petitioner on the issue of discrimination, saying that the evdence was insufficient to show any deliberate or intentional plan or purpose of the taxing authorities to assess

some and not assess others, or to assess some for a short period and others for a longer period (R. 269-294).

A directed verdict is proper only if there is no conflict in the evidence or no evidence to sustain the position of the party against whom it is directed.

The evidence offered on behalf of petitioner shows the following unequal treatment by the taxing authorities of Fulton County, Georgia:

1. A great majority of the owners of intangibles subject to taxation in Fulton County, Georgia for the period 1931-1937 was not assessed for *ad valorem* taxation and paid no *ad valorem* taxes. Between December 27, 1937 and January 1, 1938, the taxing officials selected a small number of owners of mortgage credits, 51 in number, including petitioner, and mostly non-residents, and a small number of owners of stocks and bonds, 63 in number, against whom assessments were made for each of the years 1931-1937 inclusive, but no assessments were made at that time or in any subsequent years against the vast majority of the holders of intangibles who had not paid any *ad valorem* taxes on their intangibles for the years in question. This constituted an unequal treatment of petitioner as against the treatment intentionally and systematically given to the great majority of the holders of intangibles. One of the defendants, W. Comer Davis, who during the time of the assessments was Secretary of the Board of Tax Assessors of Fulton County, testified they felt that they had covered the intangible tax picture, but the evidence of the Chairman of the Board of Tax Assessors at that time showed that no efforts were made after January 1, 1938 to make any assessments against owners of intangibles. The reason for this was the passage of the Intangible Tax Act, which contained a provision forgiving all

past-due intangible taxes where a return was made for the year 1938 under the terms of the statute.

2. The taxing authorities, during the period 1931-1937 inclusive, and particularly during the years 1935 and 1936, accepted a small number of returns by owners of intangibles and assessed them on the basis of mortgage credits at 25%, stocks and bonds at 15%, and cash at 5%. In such cases no effort was made to assess these taxpayers for any year prior to 1935 and no effort was made to collect any interest or penalties. The assessment against petitioner on the basis of 30% for each of seven years, together with interest and penalties, constituted unequal treatment. In fact, it represented a four-fold departure by the taxing authorities from the system of assessment in effect in the years 1935-36, to-wit:

(a) The percentage of assessed value was greater, i.e., 30% as against 25%;

(b) The period of time covered by the assessments was greater, i.e., seven years as against the current year;

(c) Interest was imposed on petitioner, whereas no interest was imposed on other taxpayers;

(d) Penalties were imposed on petitioner, whereas no penalties were imposed on other taxpayers.

The Georgia Supreme Court in *Montgomery* v. *Suttles*, 191 Ga. 781, 13 S. E. 2d 781, granted relief to a taxpayer who had been assessed 50% on his stocks and bonds, where it was shown that other holders were assessed only 15%.

There was ample evidence for a submission of the issue of discrimination to the jury and the evidence clearly shows that petitioner received unequal treatment from the taxing officials of Fulton County, and further, that the different treatment of other taxpayers was the result of an intentional and systematic plan.

Conclusion

The decision of the Georgia Supreme Court is of great importance to petitioner. Not only is a large amount of money involved, but by reason of the fact that prior to 1937 no contention was made that the local solicitation of an application for loan to be made by a non-resident, if accepted at the residence of the latter, localized the business of lending money at the residence of the borrower and there fixed the *situs* for *ad valorem* taxation of such loan, *ad valorem* taxes on such credits were not considered in fixing interest rates. If the decision of the Georgia Supreme Court is Correct, then it would follow that the mortgage credits of petitioner secured by real estate in other states has a taxable *situs* in such other states, merely because petitioner utilized the services of salaried employees to submit applications for loans and to handle the transmission of papers.

The decision of the Georgia Supreme Court is of general importance because of similar cases now pending in the Georgia courts in which taxpayers have raised the same constitutional questions, and a decision by this Court on these constitutional questions would be a substantial contribution to the determination of those cases.

It is respectfully submitted, therefore, that petition for certiorari should be granted.

Dan MacDougald,
Robert S. Sams,
Dudley Cook,
Attorneys for Petitioner.

Of Counsel:
MacDougald, Troutman & Arkwright,
Atlanta, Georgia.

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Respondents respectfully file this Reply Brief to the Petition for Certiorari filed by Northwestern Mutual Life Insurance Company as petitioner in the above case.

REPLY TO PETITIONER'S SHORT STATEMENT OF MATTER INVOLVED.

Petitioner's statement of issues fails to include one material issue and, as respondents view the record, contains (Petition, page 7) an erroneous statement that the respondent tax officials relied upon the Georgia Intangible Tax Act (Georgia Laws 1937-8, Ex. Sess. p. 156, Ga. Ann. Code, Section 92-114, et seq.) for their authority.

In addition to the issue of taxability, there was in the record at the time of trial an issue of discrimination raised by plaintiff's Fifth Amendment (printed transcript, pp. 107-109). Previous amendments of plaintiff attempting to raise an issue of discrimination on other grounds were excluded by the State Court for reasons which appear in a series of orders contained in the transcript and on each previous occasion that plaintiff sought to raise an issue of discrimination, plaintiff amended to meet objections pointed out by the State Court. It is the contention of respondents that this series of amendments by plaintiff eliminated all issues of discrimination contained in every amendment except the Fifth Amendment because, as a matter of State law, a party in a suit pending in the Courts of Georgia "having submitted to the ruling of the Court on the demurrer, and amended—to meet such ruling, cannot afterwards be heard to say that the amendment was not necessary."

The above quoted language is adapted from the decision of the Court of Appeals of Georgia in the case of

Brantley Company vs. Southerland, Sheriff, 1 Ga. App. 804, *Opinion 806,* 57 S. E. 960, *Opinion 961.*

With this brief introductory statement, we pass to the argument and citation of authorities which will be divided into the following sections:

1. An Analysis of the Issue of Discrimination in Light of the Record.

2. The Georgia Intangible Tax Act is not an Issue in this Case.

3. Northwestern Mutual has not Shown that its 30% Assessment Exceeds the Average Valuation at which Taxable Property was Generally Assessed in the County.

4. Under the Federal System the Property in Question is Subject to the Taxing Power of the State of Georgia and the Constitution of Georgia Forbade its Exemption.

1. An Analysis of the Issue of Discrimination in Light of the Record.

The Supreme Court of Georgia in a unanimous decision held (38 S. E. 2d, p. 800) that petitioner by yielding to the Trial Court's ruling on the First, Second, Third and Fourth Amendments waived its right to insist upon issues of discrimination not included in the Fifth Amendment (T 107-109). Accordingly, it was upon the issue of discrimination raised by the Fifth Amendment that plaintiff who is now petitioner in certiorari, went to trial.

This rule of Georgia practice that a party who amends his pleadings to meet the Court's ruling on demurrer cannot afterwards be heard to state that the amendment was unnecessary, is most tersely stated in the Third Edition of "Georgia Practice Rules" by the late A. W. Cozart, Section 146, under the caption, "Amending Prevents One from Complaining."

Georgia cases cited as authority for this ruling include:

Glover vs. Savannah, Florida & Western Railway Company, 107 Ga. 34, *third division of opinion, page 43,* 32 S. E. 876.

Brantley Company vs. Southerland, Sheriff, 1 Ga. App. 804, *first division of opinion 806,* 57 S. E. 960, *Opinion 961.*

Other cases holding to the same effect include:

Rivers, et al. vs. Key, et al., 189 Ga. 832 (1), 7 S. E. 2d 732.

Rome Railroad Company vs. Thompson, 101 Ga. 26 (11), *Opinion 32,* 28 S. E. 429, *Opinion 431, Col. 2.*

Accordingly, after plaintiff had elected by successive amendments to eliminate other issues of discrimination, plaintiff went to trial before a jury solely upon an issue of taxability and upon an issue of discrimination which is contained in plaintiff's Fifth Amendment.

Scope of Issue of Discrimination Pleaded by Fifth Amendment.

This Fifth Amendment appears on pages 107, 108 and 109 of the printed transcript and a careful reading of this Fifth Amendment shows that the material facts there pleaded regarding discrimination are confined to the following portions of this amendment:

(a) The latter portion of Paragraph 67 of the amended petition beginning with the words in the ninth line of Paragraph 67 (T 107) which read, "for that said Board of Tax Assessors, the defendants herein, adopted a plan and policy," and continuing through the remainder of Paragraph 67.

(b) Paragraph 68 of this Fifth Amendment (T 107-108) which charged that the defendants executed this plan of discrimination "wilfully, deliberately and systematically," etc.

(c) Following the allegations contained in Paragraphs 67 and 68 above quoted, plaintiff proceeded in Paragraph 69 (T 108) to plead the legal result of the alleged discrimination, claiming violation of the Fourteenth Amendment to the Federal Constitution and of the due process, equal protection and uniformity of taxation clauses in the Constitution of Georgia.

(d) Paragraph 70, which is the last paragraph of this Fifth Amendment (T 109) alleged generally, "by reason of the foregoing, said purported assessment is null and void—and the enforcement based thereon should be enjoined and the relief granted petitioner as prayed in the original petition."

Accordingly, plaintiff by this charge in plaintiff's Fifth Amendment left off for the first time all reference to the

Georgia Intangible Tax Act and pleaded, insofar as discrimination is concerned, a new case which it attempted to prove.

This Fifth Amendment does not contain a single word about the Georgia Intangible Tax Act and the Fifth Amendment does not attempt to charge discrimination because of alleged application to other species of property of preferred rates regardless of the effect that such irregularity may have had upon plaintiff's proportionate tax liability for the total tax burden of the county.

Thus, it becomes apparent why the Court in its order on the Fifth Amendment (T 112) added the language:

> "The previous orders on demurrers in this case are not changed by this order."

2. The Georgia Intangible Tax Act is not an Issue in this Case.

Respondents most insistently take exception to the continued attempt of petitioner in certiorari to seek to base a charge of discrimination upon the Georgia Intangible Tax Act or any provision therein contained.

The Georgia Intangible Tax Act which is codified in Sections 92-114, et seq. of the pocket part of the Georgia Annotated Code was an Act of the Legislature of Georgia approved December 27, 1937 (Georgia Laws 1937-8, Ex. Sess. pp. 156-170) which classified certain intangibles for taxation in Georgia *effective with the calendar year commencing January 1, 1938.*

This classification of intangible property was not even authorized in Georgia prior to the constitutional amendment proposed by the Legislature February 22, 1937 (Georgia Laws 1937, p. 39) and ratified at an election held by the people on June 8, 1937.

Prior to the adoption of this classification tax act which had been recently authorized by the constitutional amendment, both the Constitution and laws of Georgia required uniform taxation at the same rate for ad valorem purposes of all property without regard to its species.

Verdery vs. The Village of Summerville, 82 Ga. 138, *Opinion 140*, 8 S. E. 213, *Opinion 214*.

The assessment in question was made by a county board of tax assessors which derived its authority from a uniform law of Georgia first enacted in the year 1913 which is codified as Chapter 92-69 of the Georgia Code of 1933.

The Georgia Intangible Tax Act transferred *effective with the calendar year 1938,* to a separate and distinct State authority the function of assessing beginning with the year 1938 the intangibles that were classified by that act. Neither the caption nor the purpose of the Intangible Tax Act related or attempted to relate to the functions of county tax authorities for the year 1937 and previous years and the constitutional amendment ratified by the people of Georgia on June 8, 1937 did not authorize the Legislature to modify or abridge to any degree the authority of county officers over taxable property prior to its classification, nor did this constitutional amendment ratified June 8, 1937 authorize the forgiveness of any taxes owing by any person subject to tax in the State of Georgia for the year 1937 and prior years.

The forgiveness of such taxes was expressly forbidden by at least two other clauses of the State Constitution, namely, Article VII, Section II, Paragraph IV of the Constitution of 1877 (Code of 1933, Section 2-5005) and Article IV, Section I, Paragraph I of the Constitution of 1877 (Code of 1933, Section 2-2401).

The confusion engendered in this case by the persistent effort of the Northwestern Mutual to resort to this Georgia Intangible Tax Act in order to escape liability for taxable years prior to the effective date of the Georgia Intangible Tax Act will become crystal clear by the analysis presented in the next section of this argument.

The Trial Court's orders—first and last—on the issue of discrimination is comprehended in the Court's able analysis of constitutional discrimination contained in its order dated April 29, 1943 (pp. 84, 85 and 86 of the printed transcript) disallowing plaintiff's First Amendment.

The holdings of the Trial Court in this order are as follows:

First. That the Georgia Intangible Tax Act is not an issue in this case.

Second. The issue of discrimination must be determined separately as to each year's taxes.

Third. That during the years in question there were only two classes of property in Georgia with respect to taxation, that is, property subject to tax and property exempt from tax. Constitutional equality and uniformity required that each taxpayer in the county pay only his just proportion of the taxes to which all property was subject, according to the comparative value of his property and the total amount of taxes to be paid.

3. Northwestern Mutual has not Shown that its 30% Assessment Exceeds the Average Valuation at which Taxable Property was Generally Assessed in the County.

The Court's order dated April 29, 1943 closed with two paragraphs (T 86) inviting plaintiff to amend to reduce its tax liability from a tax on a 30% assessment to a tax on a 25% assessment, which amendment plaintiff consistently refused to file.

The analysis by the Trial Judge of the requirements of constitutional equality were based upon the following decisions:

(a) Taylor, et al. vs. Louisville & Nashville Railroad Company (C.C.A 6th Circuit, 7/5/98) 88 Fed. 350, *Opinion 363;*

(b) Verdery vs. The Village of Summerville, 82 Ga. 138, *Opinion 140,* 8 S. E. 213, *Opinion 214;* and

(c) Sioux City Bridge Company vs. Dakota County, 260 U.S. 441, 67 L. Ed. 340, 43 S. Ct. 190, 28 A.L.R. 979.

This case of the Northwestern Mutual Life Insurance Company is a most remarkable case in that Northwestern Mutual comes into Court with an admission in its pleadings

that its property has been assessed at only 30% of market value (printed Petition for Certiorari, p. 3, line 16; Paragraph 35 of Petition, Transcript pp. 57 and 58).

Constitutional equality is not intended to give a preference to a taxpayer whose property is assessed at a valuation below the average.

The question of comparative equality in the assessment of different species of property and the factors necessary to be applied to the assessment of a given taxpayer to increase or reduce it to the common level is analyzed in the case of

Taylor, et al. vs. Louisville & Nashville Railroad Co., (C.C.A. 6th Circuit) 88 Fed. 350, *Opinion 362, 363.*

While in other cases the courts have determined generally that a given taxpayer was or was not entitled to equitable relief, depending upon whether or not the tax demanded was more or less than the taxpayer's equal share of taxes, this Taylor case contains the only comprehensive analysis of the rules of equality as applied to the assessment of various species of property at different ratios of value.

The Supreme Court of New Hampshire made a comparable analysis in the case of

Amoskeag Mfg. Co. vs. The City of Manchester, 70 N.H. 200, 46 Atl. 470.

If the order of Hon. Paul S. Etheridge dated April 29, 1943 (T 84-86) is placed alongside the Taylor and Amoskeag Mfg. Co. decisions, it will at once appear at Judge Etheridge applied with great skill the principles of exact equality to the facts of this case.

By the last two paragraphs of this order (T 86), Northwestern Mutual was given opportunity to seek a reduction of its 30% assessment to a 25% assessment. However, Northwestern Mutual rejected this offer, amended on four subsequent occasions and persisted in its position that it would pay all the tax assessed or none at all. Authorities cited in the first division of this argument sustain the argument that Northwestern Mutual Life Insurance Company must now abide by its election.

In our opinion, this Northwestern Mutual case is the only case in the books (with the exception of the Montgomery case) where a taxpayer assessed at only 30% of value has sought a reduction below the average at which taxable property in the county is assessed.

The Circuit Court of Appeals decision in the case of Taylor vs. Louisville and Nashville Railroad Company, 88 Fed. 350, *Opinion 363,* is, in our opinion, the most direct and controlling authority in point of all the cases on discrimination. This Circuit Court of Appeals decision *was cited and followed* by the Supreme Court of the United States in Green vs. Louisville and Interurban Railroad Company, 244 U. S. 499, *Opinion 516 and 517,* and also Sioux City Bridge Company vs. Dakota County, 260 U. S. 441, *Opinion 446.*

It is not necessary to refer to the question of *comparative equality* in the average case on discrimination because cases on discrimination almost without exception relate to one individual or a group of individuals assessed at a valuation higher than the average valuation and generally at 100% of market value.

Because Mr. Justice Taft in the case of Taylor vs. Louisville and Nashville Railroad Company (Opinion, 88 Fed. p. 363) analyzed the law as applied to a taxpayer with a favored assessment, we consider this Circuit Court of Appeals decision the most controlling authority.

Sioux City Bridge Company vs. Dakota County, 260 U. S. 441, supra, related to a taxpayer who had been assessed at approximately 100% of value, whereas other taxpayers subject to the same tax were assessed at between 49% and 56% of value (see Opinion, pp. 443 and 446).

It is significant that the Supreme Court decision in the Sioux City Bridge Company case was written by the same Judge who on circuit wrote the opinion in Taylor vs. Louisville and Nashville Railroad Company (88 Fed. 350) and that the headnote in the Sioux City Bridge Company case contains an expression which reconciles all authorities and shows their application to the Northwestern Mutual case

which is now before the Court. We here refer to the second headnote in Sioux City Bridge Company vs. Dakota County, 260 U. S. 441, which reads as follows:

> "The owner aggrieved by this discrimination is entitled to have his assessment reduced to the *common level,* since by no judicial proceeding can he compel reassessment of the great mass of such property at its true value as the law requires." (Italics ours.)

We respectfully close this section of the argument by calling the Court's attention to the fact that Northwestern Mutual has not shown, and has not attempted to show, by any of its pleadings or evidence that other taxpayers of Georgia were *generally assessed,* or that the "common level" of assessment of other property, was as low as the 30% assessment which it enjoyed.

This inability of Northwestern Mutual to plead or to prove discrimination accounts, as we believe, for its desperate effort to build up a case out of the passage on December 27, 1937 of the Georgia Intangible Tax Act which transferred effective January 1, 1938 to a new and separate authority jurisdiction to assess for the years 1938 and thereafter the particular species of property upon which Northwestern Mutual declined to pay its uniform ad valorem tax for the year 1937 and years prior thereto.

It is not every case of unequal assessment that entitled a taxpayer to relief. The assessment of 30% on the property of petitioner in certiorari may be less than the assessment of property generally subject to tax in the county.

The burden of proof to show an assessment higher than the common average rests upon Northwestern Mutual Life Insurance Company.

Georgia Railroad and Banking Company vs. Wright, 125 Ga. 589 *Opinion 604-606,* 54 S. E. 52, *Opinion 58, Col. 2, and 59.*

Sunday Lake Iron Company vs. Wakefield, 247 U. S. 350, 353, 62 L. Ed. 1154, 38 S. Ct. 495.

Chicago Great Western Railway Company vs. Kendall,

266 U. S. 94, *Opinion 98 and 99*, 69 L. Ed. 183, 45 S. Ct. 55.

4. Under the Federal System the Property in Question is Subject to the Taxing Power of the State of Georgia and the Constitution of Georgia Forbade its Exemption.

The test for State taxability applied by the Supreme Court of the United States is:

> "Whether the taxing power asserted by the State bears fiscal relation to protection, opportunities and benefits given by the State. The simple but controlling question is whether the State has given anything for which it can ask return."

State of Wisconsin vs. J. C. Penney Company, 311 U. S. 435, *Opinion 444*, 61 S. Ct. 246, *Opinion 250, Col. 1*, 85 L. Ed. 267.

The fundamental relation between payment of ad valorem taxes and business opportunity is declared by the Supreme Court of Georgia in language comparable to that of the controlling United States Supreme Court.

Armour Packing Company vs. City Council of Augusta, 118 Ga. 552, *Opinion 554*, 45 S. E. 424, *Opinion 424 and 425*.

The Supreme Court of Georgia in its first decision in this case (Suttles vs. Northwestern Mutual Life Insurance Company, 193 Ga. 495, 19 S. E. 2d 396) did find that because of the particular facts of this case a "substantial connection" existed between a loan business conducted by the Northwestern Mutual Life Insurance Company in Georgia and the property sought to be taxed.

With respect to the delivery in Fulton County, Georgia, by the salaried loan agent to the borrower of the checks which were the consideration for the loans in question, the Supreme Court of Georgia said (Opinion, 193 Ga. 509, 19 S. E. 2d p. 405, Column 2):

> "The case would not be different if the company had in each instance sent a bag of money to be delivered by

Durant to the borrower; and if that had been done, we think the company would have been doing business in Georgia, and none the less so, from a legal standpoint, than if all that might have been so used had been sent to him in one lot, for delivery from time to time, on particular instructions as loans were made."

The decision of the Supreme Court of Georgia as to whose agent Mr. Durant was and as to what constitutes agency is a decision of a State Court on a State question. No substantial federal question is presented by a challenge to that State Court ruling.

The State Court having found that a substantial connection existed between the credits sought to be taxed and the acts locally performed by the general loan agent of Northwestern Mutual, the basis of the State Court's decision is the requirements of the State Constitution.

Suttles vs. Northwestern Mutual Life Insurance Company, 193 Ga. 495 (2), *Opinion 506,* 19 S. E. 396, *Opinion 403, 404.*

Decision on second appeal to State Court: Northwestern Mutual Life Insurance Company vs. Suttles, 38 S. E. 2d 786, *Opinion 796.*

The decision of the State Court on the question of taxability is also sustained by the following Federal authorities:

Chattanooga National Building & Loan Ass'n vs. Denson, 189 U. S. 408, *Statement of Facts, p. 412,* 47 L. Ed. 870, 23 S. Ct. 630.

Metropolitan Life Insurance Company vs. New Orleans, 205 U. S. 395, *Opinion 397, 400, 401,* 51 L. Ed. 853, 27 S. Ct. 499.

Bristol vs. Washington County, 177 U. S. 133, 44 L. Ed. 701, 20 S. Ct. 585.

(See particularly comment on Bristol vs. Washington County in Metropolitan Life Insurance Company vs. New Orleans, 205 U. S. at page 401, supra.)

CONCLUSION

In the opinion of respondents the above analysis and authorities show conclusively that no substantial federal question is presented by the petition for certiorari.

It is our opinion that the decisions of the Supreme Court of the United States cited under Division 4 of this argument demonstrate beyond question that the property sought to be taxed was within the orbit of the State taxing power and that the State was free to apply to the property in question the requirements of its own Constitution and laws regarding taxation.

We also believe that Northwestern Mutual with its 30% assessment has not made out a case on discrimination. Taxpayer's evidence on the issue of discrimination is outlined in the Statement of Facts in the Georgia Supreme Court decision to which this petition for certiorari is filed and will not be repeated here.

Insofar as the Georgia Intangible Tax Act is concerned, the State Court's Decision (Opinion, 38 S. E. 2d, page 798, Col. 2) that the power of the County Tax Assessors with respect to taxes for the year 1937 and prior years is not affected thereby, is certainly a State Court's decision on a State question and gives no right to review by the Supreme Court of the United States.

Respectfully submitted,

E. H. SHEATS,

STANDISH THOMPSON,

W. S. NORTHCUTT,

Attorneys at Law for Respondents

P. O. Address:

1403 C. & S. Nat. Bank Bldg.,

Atlanta, Georgia.

Due and legal service of the foregoing Reply Brief acknowledged; copy received. All other and further service and notice waived.

This December ...., 1946.

....

Attorneys at Law for Petitioner

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No. 653

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

vs.

T. E. SUTTLES, AS TAX COLLECTOR OF FULTON COUNTY, GEORGIA, W. COMER DAVIS, REESE PERRY AND JOHN C. TOWNLEY, AS MEMBERS OF THE BOARD OF TAX ASSESSORS OF FULTON COUNTY, GEORGIA.

PETITION FOR REHEARING BY NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY

DAN MACDOUGALD,
ROBERT S. SAMS,
DUDLEY COOK,
Attorneys for Petitioner.

Of Counsel:
MACDOUGALD, TROUTMAN & ARKWRIGHT,
Atlanta, Georgia.

TABLE OF CASES CITED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

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PETITION FOR REHEARING BY NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, petitioner in the above entitled cause, and presents this its petition for a rehearing of the Court's denial of its petition for a writ of certiorari to the Supreme Court of Georgia, and in support thereof respectfully shows:

1.

This Court, on January 6, 1947, denied petitioner's application for a writ of certiorari to the Supreme Court

of the State of Georgia. On January 9, 1947, the Supreme Court of Georgia handed down a decision in the case of *Davis, et al., v. Penn Mutual Life Insurance Company,* a case which, like this one, involved the taxability of credits arising from loans made by a non-resident insurance company on the security of property located in Fulton County, Georgia. The Georgia Supreme Court in the latter case held that the mortgage credits owned by the Penn Mutual Life Insurance Company had not acquired a situs in Fulton County, Georgia, so as to be subject to ad valorem taxation in said county, as they did not arise out of a loan business conducted by said insurance company in Georgia. The situation presented in the *Penn Mutual* case is so analagous to that here presented that it serves to emphasize clearly the incorrectness of the Georgia court's decision in this case, and to illustrate how petitioner has been singled out for taxation in violation of its constitutional rights.

A consideration of the Georgia court's decision in the *Penn Mutual* case with its decision in the instant case emphasizes that the only difference in the activities in Georgia of the two companies was in the method of obtaining applications for loans, this being sufficient to localize the mortgage credits in one case but not in the other. The Georgia court makes the important factor to be *not where the loans are actually made,* but *how applications are secured.*

We believe this recent *Penn Mutual* decision fully warrants the filing of this petition for rehearing, and we request the Court to re-examine our application for certiorari and particularly in the light of this recent deci-

sion. As the case has not as yet been reported, we have obtained from the Clerk of the Georgia Court a certified copy thereof, and this is set out in the appendix to this petition for rehearing.*

2.

We ask the Court to compare the method employed by the Penn Mutual Life Insurance Company in making loans on the security of Georgia real estate, as described in the recent decision of the Georgia Supreme Court, with those employed by petitioner. The method described in the *Penn Mutual* case was as follows:

(a) The borrower would file with Lipscomb, Weyman & Chapman Company, a real estate broker in Atlanta, an agreement employing this broker to obtain for him a loan.

(b) The real estate broker would submit an application signed by the borrower to Graf, a salaried employee of the Penn Mutual Life Insurance Company, with an office in Atlanta.

(c) Graf received the application and inspected the property, and mailed his report, together with the application, to the home office of the Company in Philadelphia, to be there accepted or rejected. The Court points out that these were his only duties in connection with the loan, and that he never saw the applicant, his entire dealings being with applicant's agent, the real estate broker.

(d) The Finance Committee of the Penn Mutual

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* The Georgia Supreme Court had previously considered the *Penn Mutual* case on an appeal from the overruling of a general demurrer. This case is cited in our brief in support of petition for writ of certiorari, page 18. (*Davis v. Penn Mutual Life Insurance Company*, 198 Ga. 550, 32 S. E. (2) 180).

functioning in Philadelphia, passed on the loan and advised the real estate broker direct of their action.

(e) At the request of the broker, the home office wrote direct to the law firm of Alston, Foster, Moise & Sibley, in Atlanta, and this firm, although paid by the borrower and in theory at least representing the borrower, handled all details in connection with examination of title, preparation of papers such as were required locally and not in Philadelphia, and closed the loan. A check was sent from Philadelphia to the Alston firm, with instructions as to how it was to be disbursed, and it was deposited in a special bank account by this firm and disbursed pursuant to directions of the home office.

(f) Repayment of the loan was made either through the broker or direct to the home office in Philadelphia.

(g) Graf had extensive duties in connection with the collection of loans, and particularly in such cases where there was a default.

Petitioner had a paid employee, Durant, with an office in Atlanta. He was authorized to contact prospective borrowers and to submit applications for loans. He served as an intermediary between the Loan Department in Milwaukee and the applicants or borrowers in Atlanta. Like the Penn Mutual agent, he received applications which were forwarded to the home office and he inspected the property offered as security and gave his opinion. Like Graf, he had no authority to make a loan or to commit the Company to make a loan. He had no money under his control which he was authorized to lend. Like Graf, he also was primarily concerned with the protection of the security and the liquidation of the loans.

Actually, more of the matters in connection with the making of loans were performed by petitioner at its home office in Milwaukee than by the Penn Mutual at its home office in Philadelphia. While the Georgia Court emphasizes that Graf had no actual contact with the applicant for a loan, nevertheless Graf did have contact with the loan agent which had been specifically authorized to act as the agent of the borrower, and there is no difference in law between the application being submitted by the agent rather than by the principal.

As we have pointed out in our petition and supporting brief, the primary duty of petitioner's agent in connection with the loan was to see that the borrower performed those things required of him by the Finance Committee in Milwaukee. When the borrower's counsel obtained an abstract, this was forwarded to the home office. When other papers were furnished by the borrower as required, these were fowarded to the home office.

We submit that the loan business conducted by petitioner was as clearly located in Milwaukee as that conducted by the Penn Mutual was located in Philadelphia, and that there is no basis in the evidence in petitioner's case to justify a finding that anything was done locally to support a conclusion that such business had been localized.

It is unnecessary in this petition to point out how, such a position being sound, the decision of the Georgia Supreme Court would violate petitioner's constitutional rights. These have been fully set out in the petition for writ of certiorari and supporting brief.

3.

The distinction made between the methods employed by other insurance companies and this petitioner are distinctions without a difference. As pointed out in our petition for writ of certiorari (page 6), insurance companies engaging in lending money from a central office to borrowers over a wide territory, handle the solicitation of applications for loans to be submitted and passed on by the home office, to be there accepted or declined, by one of three methods:

(a) Borrowers or brokers submit the applications.

(b) The lending company appoints correspondents who are independent agents, to solicit and submit applications.

(c) The lending company employs salaried agents to solicit and submit applications.

The actual functions performed in each case are substantially the same. In the first two, the fees of the broker or correspondent are generally paid by the borrower. In the third, the salary is paid by the lender. But there is no real difference in the duties performed and one method no more constitutes the function of lending money than another. In none of them is there a localization of the business so as to justify taxing the loan credits elsewhere than at the home office where the loans are actually made.

The Georgia Supreme Court has held that the maintenance of an office in Fulton County for the purpose of protecting the security would not be sufficient to localize the loan business, regardless of the number of employees or the extent of the activities required in connec-

tion therewith, provided the purpose is merely the protection of the security and the ultimate collection or liquidation of the indebtedness. *Suttles v. Associated Mortgage Companies,* 193 Ga. 78, 17 S. E. (2) 272; *National Mortgage Corporation v. Suttles,* 194 Ga. 768, 22 S. E. (2) 386; *Davis v. Penn Mutual Life Insurance Co.* (See appendix). As we endeavored to point out in our original petition and supporting brief, between the years 1931-1937, which is the actual period in question, Durant, the salaried agent of petitioner, was engaged only in assisting petitioner in the protection of its security and the ultimate collection or liquidation of the loans. Not a single application for a loan was solicited, and the only activities of Durant were in connection with the loans which had previously been made.

The only activities ever engaged in by Durant, petitioner's agent, other than those outlined above, were in connection with the solicitation or receiving of applications for loans. While Durant during the period in question was authorized to receive and transmit to the home office any applications for loans, he did not actually do so. All activities of Durant in connection with solicitation were performed prior to 1931. In such cases, he merely received applications and forwarded them to the home office in Milwaukee.

That it is possible to lend money to borrowers on the security of real estate located in Fulton County Georgia, without engaging in said county in the business of lending money, is clear from the decisions of the Georgia Court. In each such case, the agents of the Company at the home office must receive applications for loans, pass

on such applications and decide whether to accept or reject them and, if accepted, the terms upon which they will be accepted. Does it produce a different result in law that an agent of the Company actually obtains an application for a loan from the prospective borrower and sends it in to the home office, rather than a broker or loan correspondent, approved by the lender but paid by the borrower, obtains the application and submits it either to a local agent of the company, who in turn forwards it to the home office, or sends it direct to the home office? To so hold would be in direct conflict with the principle that the localization of a business only takes place when the owner delegates authority to an agent in the place in question to conduct the business on his behalf at that place.

4.

We have found no case, other than this one, either of this Court or the courts of other States or of the courts of Georgia, where a local situs for intangibles has been upheld except where such intangibles have become a part of a local business under the authority and control of local management (See pages 20-23 of our brief in support of the petition for certiorari). While the Georgia Court in this case has set forth the correct principles of law to be applied, it has denied petitioner its constitutional rights in its application of those principles to the evidence of the case. This being so, we respectfully urge the Court to reconsider its decision and to grant the writ of certiorari sought. If petitioner was carrying on any business in Fulton County, Georgia, at most it was the business of soliciting applications. It was clearly not the busi-

ness of lending money. The two are not the same, either in law or in fact.

5.

This case is merely one of a series of cases growing out of the attempt of the tax officials of Fulton County, Georgia, to collect ad valorem taxes for 1937 and the six years prior thereto from non-resident companies owning notes secured by mortgages on real estate located in Fulton County, Georgia. Each of the non-resident life insurance companies involved, conducts its loan business at its home office, but the details in connection with the securing of applicants, the transmission of papers and other pertinent information vary slightly from company to company. The Georgia Supreme Court, in each of these cases considered by it, with the exception of this one, has held such credits to be non-taxable.* It has sought to distinguish this case from the others, based solely on the difference in the handling of the applications and other details in Georgia, which differences we submit are without substance and merely distinctions without a difference. Other such cases have been tried in the Fulton Superior Court and have resulted in decisions in favor of the non-resident insurance company. The only case in which the non-resident insurance company has been held subject to ad valorem taxation is the instant one.

The taxes, interest and penalties in this case exceed $275,000. If the Georgia Court's decision is allowed to

* National Mortgage Corp. v. Suttles, 194 Ga. 768; 22 S. E. (2) 386; Suttles v. Associated Mortgage Companies, 193 Ga. 78, 17 S. E. (2) 272; Davis v. Metropolitan Life Ins. Co., 196 Ga. 304; 26 S. E. (2) 618; Davis v. Penn Mutual Life Ins. Co. (See appendix).

stand, it will also serve as a basis for demanding taxes of petitioner for subsequent years of an additional large amount, when no other company conducting a loan business in the same manner as petitioner from a central office but employing different methods of securing applications, is required to pay any ad valorem taxes at all. The matter is, therefore, not only of substantial importance to petitioner and its policy holders (petitioner being a mutual company) by reason of the amount involved and by reason of the unequal competitive situation created, but of importance generally in that it constitutes a clear misapplication of well established and vitally important principles as to the taxation of intangibles belonging to a non-resident.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that petitioner's application for a writ of certiorari to the Supreme Court of Georgia be, upon further consideration, granted.

Respectfully submitted,

DAN MACDOUGALD,
ROBERT S. SAMS,
DUDLEY COOK,
Attorneys for Petitioner.

Of Counsel:
MACDOUGALD, TROUTMAN & ARKWRIGHT,
Atlanta, Georgia.

I, Dan MacDougald, of counsel for the above-named petitioner, do certify that the foregoing petition for rehearing in this cause is presented in good faith and not for delay.

Respectfully submitted,

DAN MACDOUGALD.

No. 15638. Supreme Court of Georgia

Decided January 9, 1947

Davis et al. v. Penn Mutual Life Insurance Co.

By the Court:

1. A promissory note executed by a resident of this State, but owned by a non-resident and held by it at its domicile out of the State, is to be taxed here only if it is derived from or is used as an incident of property owned or of a business conducted by the non-resident or his agent in Georgia; and this is true although the note may be secured by a mortgage on land situated in this State.

2. "Where there is no conflict in the evidence, and that introduced, with all reasonable deductions or inferences therefrom, shall demand a particular verdict, the court may direct the jury to find for the party entitled thereto." Code, Sec. 110-104.

3. It is not error to exclude immaterial evidence.

On October 22, 1937, The Penn Mutual Life Insurance Company, a non-resident corporation with its home office in Philadelphia, filed a petition in the Superior Court of Fulton County, Georgia, against C. H. Gullatt, Reese Perry and H. W. Gilbert, as members of the board of Tax-assessors of Fulton County; Standish Thompson, as attorney for the board of tax-assessors; Guy Moore, as Fulton County tax receiver; and T. E. Suttles, as Fulton County tax collector, to enjoin a threatened assessment by the board of tax-assessors and its attorney of certain credits belonging to plaintiff for ad valorem state and

county taxes for the years 1931 to 1937, inclusive; to enjoin the tax receiver from entering any assessment against its property on the tax digest, and to enjoin the tax collector from issuing an execution against it with respect thereto. Later, by amendment, the names of C. H. Gullatt and H. W. Gilbert were stricken as parties and W. Comer Davis and John C. Townley, as successor members of the board of tax-assessors, were made parties defendant in their stead. The petition attacked the constitutionality of the statutes under which the tax-assessors acted, but by further amendment plaintiff struck from its petition all allegations concerning the validity of the statutes. The petition as it then stood alleged that plaintiff had been licensed to carry on a life insurance business in the State of Georgia, and incident to that business, which had been conducted for more than seven years, it owned valuable property in Fulton County on which it had annually paid all tax, state and county, required of it. The credits sought to be taxed were not connected in any way with its insurance business. The intangibles involved were evidenced by promissory notes signed by various citizens of Fulton County and secured by deeds to lands located in that county. They were owned by plaintiff, a non-resident corporation, and held at its domicile in Pennsylvania. They were not derived from or used as an incident of property owned or of a business conducted by plaintiff or its agent in Georgia. The notes representing the credits referred to were payable at plaintiff's office in Philadelphia, Pennsylvania, and at no time during the period for which an assessment was threatened had it engaged in any loan business in Georgia or had any agent in the State authorized to invest its funds or to deal in any manner with the notes.

During the entire period of time involved its notes and deeds had been physically situated and kept without the State of Georgia. The taxing authorities of Fulton County had threatened to assess such credits for State and County ad valorem tax, to collect taxes thereon, and that they would do so unless enjoined. Its credits had no tax situs in Georgia for those years, and the imposition of such a tax would violate the due process clauses of both the State and Federal constitutions. The defendants filed general demurrers to the petition as amended, alleging that it stated no cause of action for the relief sought and was without equity. The tax-assessors filed an answer admitting that they were preparing to assess the credits represented by the notes owned by plaintiff and secured by Fulton County real estate and alleged the property sought to be assessed for tax purposes arose out of a business conducted by the plaintiff through a local agent in Georgia. The tax receiver answered that he had no intention of making an entry of any assessment against plaintiff's credits, except when the same could be properly done. The tax collector answered that when the assessments were properly made he would issue executions. The demurrers were overruled by the trial court. An exception to that judgment brought the case to this court in 1944. This court affirmed the judgment of the lower court. See *Davis v. Penn Mutual Life Insurance Company,* 198 Ga. 550 (32 S. E. 2d, 180, 160 ALR 778).

In January, 1946, plaintiff amended its petition by setting out more fully how the notes were acquired. The amendment alleged in substance:

Weyman and Connors, later known as Lipscomb-Weyman-Chapman Company, and afterwards Lipscomb-Ellis

Company, a real estate dealer or broker of Atlanta, Georgia, would be employed in writing by a prospective borrower as his agent to negotiate a loan to be secured by certain land. Weyman and Connors submitted applications to various lenders. If the application was to be submitted to the plaintiff, Weyman and Connors would send it to Howard D. Graf, a salaried employee of plaintiff who had an office in Fulton County furnished him by plaintiff. Graf would inspect the applicant's property and would mail the application and his appraisal to plaintiff's home office in Philadelphia. The action of plaintiff's Finance Committee in Philadelphia in accepting, rejecting or modifying the application was communicated by plaintiff from its home office to Weyman and Connors. Applicant, through Weyman and Connors, would then arrange with Alston, Alston, Foster and Moise, attorneys at law, of Atlanta, if the terms of the loan were satisfactory to the applicant, for the examination of title and the preparing of the proposed loan papers, at the applicant's expense. The attorneys would mail an opinion of title and the proposed note and loan deed to plaintiff at Philadelphia. If the title and loan papers were approved by the plaintiff at its home office, plaintiff would return the note and loan deed to the attorneys with plaintiff's check to cover the proceeds of the loan. The attorneys would have the papers signed and would deliver the proceeds of the loan to the borrower, and would have the loan deed recorded, and would send all the papers to plaintiff at Philadelphia where they were kept at all times except when needed in Fulton County for cancellation, collection or foreclosure. Neither the attorneys, nor Weyman and Connors (or its successors), nor Graf had authority to approve any application for a loan, or fix the terms

of a loan, or to decide for the plaintiff whether or not the value of the property offered as security was sufficient, or to deal with the notes or credits, and they never did so. Graf had no authority to solicit applications for loans or to consummate a loan, and he never did so. The right to pass upon all such questions was at all times in plaintiff's Finance Committee which always met in Philadelphia.

The court overruled the defendant's renewed general demurrers to the petition as amended in January, 1946.

The case was tried before the court and jury in January, 1946. There was no disputed issue of fact raised by the evidence. The court directed a verdict for the plaintiff and entered a final decree enjoining the threatened assessment. The defendants' motion for new trial as amended was denied and they filed their bill of exceptions to this court.

The following undisputed facts were shown by the evidence:

The parties stipulated that the plaintiff is a Pennsylvania corporation organized as a life insurance company; that defendants had threatened to tax as alleged; that the plaintiff had paid tax on all real estate and other property owned by it in Fulton County with the exception of the notes and credits referred to; that to collect the taxes on the credits the defendants had threatened to seize the property of the plaintiff in Fulton County; that when the petition was filed and since then the plaintiff has owned real estate in Fulton County; that the method used by the plaintiff in acquiring the Jacob Batt Loan

in 1938 illustrates how the plaintiff acquired all of the loans in question.

The undisputed evidence showed that on January 19, 1938, Jacob Batt signed a written agreement employing Lipscomb-Weyman-Chapman Company, a real estate broker of Atlanta, as his agent to negotiate for a consideration of $250.00 a loan of $12,500.00 to be secured by a loan deed conveying to a lender, or such person or corporation as Lipscomb - Weyman - Chapman Company might direct, certain property known as 168 Moreland Avenue, N. E., in Atlanta, Georgia. The loan deed was to be a first encumbrance and Lipscomb-Weyman-Chapman Company was authorized by Batt to have the property appraised and surveyed and the title abstracted. Lipscomb-Weyman-Chapman Company did submit applications for loans to various prospective lenders. In this case it decided to have an application signed by Batt submitted to The Penn Mutual Life Insurance Company. The application was directed "to The Penn Mutual Life Insurance Company, Philadelphia, Penna." It showed that there was an outstanding first mortgage of $10,850.00 on the property in favor of Peoples Savings Bank of Rhode Island. The applicant agreed in the application that he would furnish a full brief of title and would pay all expenses of the loan, including counsel fees, cost of examining property and preparing papers, and that the proposed mortgage was to be a first lien.

Lipscomb-Weyman-Chapman Company (later known as Lipscomb-Ellis Company), gave that application, with its inspection report, to Howard D. Graf, a salaried employee of the plaintiff. Graf occupied an office in Atlanta furnished to him by the plaintiff. He has held his present

position in Atlanta since 1927. During the past ten years his title in the plaintiff's organization has been "Loan Supervisor" and prior that it was "Southern Loan Inspector." Graf inspected the property and mailed his report with the application to the plaintiff at its home office in Philadelphia. He never saw or communicated with the applicant either before or after he inspected the property, and he had no further duties in connection with the loan. The plaintiff's Finance Committee was unwilling to make a loan in the amount applied for, but did agree to make a loan of $11,000.00 on certain terms and so informed Lipscomb-Ellis Company, successor to Lipscomb-Weyman-Chapman Company, by letter mailed from Philadelphia. That company was requested to notify Jacob Batt of the action taken by the plaintiff at its home office in accepting, with modifications, his application for a loan, and to advise the plaintiff whether or not the terms of the proposed loan were acceptable to him.

The applicant informed Lipscomb-Ellis Company, who in turn informed the plaintiff at Philadelphia, that the terms of the proposed loan were satisfactory. At the request of Lipscomb-Ellis Company, plaintiff from its home office in Philadelphia wrote Alston, Alston, Foster & Moise, Atlanta attorneys, that subject to the conditions specified in the letter, the plaintiff had approved the application of Jacob Batt for a loan of $11,000.00; that the application came to plaintiff through Lipscomb-Ellis Company, who would communicate with the Atlanta attorneys; that all expenses connected with the transaction, including the fees of the Atlanta attorneys, were to be borne by the applicant, and that after that had been arranged the attorneys might proceed to examine the title and prepare the papers. Lipscomb-Ellis Company

in behalf of the applicant then requested the attorneys to examine the title and prepare the loan papers at the applicant's expense.

The preliminary title report showing the mortgage of $10,850.00 in favor of Peoples Savings Bank, with an abstract of title, the proposed note and loan deed were mailed on February 17, 1938, by the attorneys to the plaintiff at its home office in Philadelphia with a request that if the papers were found to be in order they be returned to them to be signed, and that the plaintiff send them a check for $11,000.00 "in settlement of the loan." The plaintiff from its home office on March 1, 1938, mailed to the attorneys its check for $11,000.00 drawn on a Philadelphia bank payable jointly to them and Jacob Batt and by letter accompanying the check instructed them that the money was to be appropriated to the payment of prior liens, expenses, including their fees, and the balance to the borrower, but that no part of the fund was to be used until they had ascertained it to be ample to meet each item and that the plaintiff's mortgage would be a first encumbrance.

The plaintiff's check for $11,000.00 was endorsed by the borrower and by the attorneys and was deposited by them in the Citizens and Southern National Bank of Atlanta, Georgia, to the credit of "Alston, Alston, Foster and Moise, Special Account No. 1." When the loan papers were signed by Jacob Batt the attorneys drew one check on this bank account for $10,850.00 payable to the order of Jacob Batt and Leopold J. Haas and Company. This check was endorsed by Batt to the order of Leopold J. Haas and Company who were correspondents

for Peoples Savings Bank, and was delivered to them in full payment of the first mortgage held by the Peoples Savings Bank. The attorneys drew another check to the order of Jacob Batt and Lipscomb-Ellis Company for $150.00, which was endorsed by Batt to Lipscomb-Ellis Company and applied by the latter in part payment of the compensation which Batt had agreed to pay for negotiating the loan. From money obtained from Batt, Lipscomb-Ellis Company paid Alston, Alston, Foster and Moise their fee for examining the title, preparing the papers, and distributing the proceeds of the loan at Batt's direction, so as to enable him to comply with his agreement in his application to make the loan deed to the plaintiff a first encumbrance. The borrower authorized and approved in writing the disbursements made by the attorneys.

The loan was closed in the office of Alston, Alston, Foster and Moise. No employee, agent or representative of the plaintiff was present at the closing. The attorneys on March 2, 1938, mailed the original note for $11,000.00, signed by Batt directly to the home office of plaintiff and later mailed the recorded loan deed together with the abstract of title and final opinion.

The loan papers were kept in Philadelphia until the note was paid. The note was payable to plaintiff at Philadelphia. Notices of maturity of interest and principal instalments were mailed to the borrower from the plaintiff's home office. Some borrowers made payment to Lipscomb-Ellis Company and others made payment directly to the plaintiff at its home office. Payments which were made to Lipscomb-Ellis Company were either forwarded

to the plaintiff in Philadelphia or deposited by that Company in a bank in Atlanta to the credit of plaintiff. No one but officers of plaintiff at Philadelphia had authority to draw any check on that bank account. None of the plaintiff's loans were closed by check drawn on any bank in Atlanta or Georgia.

On September 3, 1937, plaintiff and Lipscomb-Ellis Company entered into a "service agreement" which provided that the agreement "shall extend only to the particular loans to which it is the intention of both parties thereto that it should extend" and that the "intention is to be determined only from letters exchanged between the parties stating in effect that the loan in question is to be taken subject to this agreement." The plaintiff wrote Lipscomb-Ellis Company on March 1, 1938, that the Jacob Batt loan was to be under the provisions of the service agreement. Lipscomb-Ellis Company would "service" any loan which the plaintiff and Lipscomb-Ellis agreed should be covered by the service agreement. "Servicing" a loan includes checking the taxes on the real estate to see whether or not they are paid, collecting delinquent interest if notified to do so and keeping up with fire insurance and seeing that the borrowers keep the buildings insured against fire.

Howard D. Graf, upon being informed by Lipscomb-Ellis Company that a borrower had defaulted in the payment of his note and that the note could not be collected, made an investigation and informed the company at its home office the results thereof. In the event Graf's investigation showed that "the case is hopeless" he would recommend to plaintiff's home office that the loan deed be

foreclosed. Graf did not make collections.

Candler, Justice (after stating the foregoing facts.)

When this case was first here in *Davis v. Penn Mutual Life Insurance Company,* 198 Ga. 550 (32 S. E. 2d, 180, 160 ALR 778), we held the allegations of the petition as it then stood were sufficient as against general demurrer to show the credits sought to be assessed for State and County ad valorem taxes had no situs for such taxation in Fulton County or the State of Georgia. It is now urged that the allegations of an amendment to the petition which has been allowed subsequent to our prior holding are sufficient to show the credits have a tax situs in Fulton County and for that reason it was error to overrule their general demurrer which was renewed to the petition as amended. The defendant in error, however, takes the position the amendment did not materially change the substance of its petition, but on the contrary only set out in detail the procedure employed in making its loans and that the petition as finally amended shows that the notes sought to be taxed did not accrue out of or incident to property owned or a business conducted by it, or its agent in Georgia. If the amendment last allowed has so completely changed the petition that it now shows the credits of plaintiff have a tax situs for State and County purposes in Fulton County then it was error, of course, to overrule the renewed general demurrer to the petition thus amended; otherwise not. The motion for new trial as amended contains, besides the usual general grounds, nine special grounds, but as we view the writ of error it presents for decision only three questions, namely: (1) Does the amended petition allege a cause of action for the relief sought; (2) did the court err in

directing a verdict for the plaintiff under all the facts and circumstances disclosed by the record; and (3) did the court err in refusing to allow in evidence certain documentary evidence offered by defendants? We shall deal with these questions in the order stated.

1. This suit was filed October 22, 1937, and does not involve the amendment adopted in 1937 to art. 7, sec. 2, par. 1 (Ga. Code Supp. Sec. 2-5001) of the Constitution of 1877, and laws enacted pursuant thereto relating to tax on intangibles, nor to art. 7, sec. 1, par. 3 (Ga. Code Supp. Sec. 2-5403) of the Constitution of 1945. The question here presented must therefore be determined under the applicable provisions of the Constitution and laws of this State as they existed prior to June 8, 1937. The constitutional provision of force during the period involved in the instant case is: "All taxation shall be uniform upon the same class of subjects and ad valorem upon all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." The political jurisdiction of a State does not extend beyond its territorial limits, and therefore it cannot lawfully impose a tax upon persons, natural or artificial, or property, residing or situated beyond such limits. A State can not tax where it has jurisdiction over neither the owner nor the property. In such a case the State affords no protection, and there is nothing for which taxation can be the equivalent. *Davis v. Penn Mutual Life Insurance Company, supra.* It is not disputed here that plaintiff is a non-resident corporation, with its home office in Philadelphia. It is, however, insisted that certain promissory notes owned by plaintiff are incident to and derived from a loan business conducted by it within the State and that these items of property are

within its taxing jurisdiction. Whether or not such items of property when owned by a non-resident have a tax situs in this State must necessarily depend upon the facts in each particular case. It has long been settled by rulings of this court that a promissory note of a citizen of this State, owned by a non-resident and held at his domicile outside of this State, is taxable here if it accrues out of or is incident to property owned or a business conducted by the non-resident, or his agent in Georgia. *Armour Packing Co. v. Savannah,* 115 Ga. 140 (41 S. E. 237) ; *Armour Packing Co. v. Augusta,* 118 Ga. 552 (45 S. E. 424, 98 Am. St. R. 128) ; *Suttles v. Northwestern Mutual Life Ins. Co.,* 193 Ga. 495 (19 S. E. 2,396, 21 S. E. 2d, 695, 143 ALR 343) ; *Colgate-Palmolive-Peet Co. v. Davis,* 196 Ga. 681 (27 S. E. 2d, 326) ; *Suttles v. Northwestern Mutual Life Ins. Co.,* 200 Ga. (38 S. E. 2d, 786) ; *Parke, Davis & Co. v. Atlanta,* 200 Ga. 296 (36 S. E. 2d, 773). And it is as equally well settled by the holdings of this court that a promissory note of a citizen of this State, owned by a non-resident and held at his domicile outside of this State, which does not accrue out of or is not incident to property owned or a business conducted by the non-resident, or his agent, in Georgia, has no situs for taxation in this State. *Collins v. Miller,* 43 Ga. 336; *Williams v. Mandell,* 44 Ga. 26; *Carhart v. Paramore,* 44 Ga. 262; *Cary v. Edmondson,* 44 Ga. 651; *Columbus Mutual Life Ins. Co. v. Gullatt,* and *Guardian Life Ins. Co. v. Gullatt,* 189 Ga. 747 (8 S. E. 2d, 38) ; *Suttles v. Associated Mortgage Cos.,* 193 Ga. 78 (17 S. E. 2d, 272) ; *National Mortgage Corporation v. Suttles,* 194 Ga. 768 (22 S. E. 2d, 386) ; *Davis v. Metropolitan Life Ins. Co., supra.* As was said by Mr. Justice Grice in the *Metropolitan case, supra,* "We must regard the law on this subject as having been established,

making it unnecessary to blaze any new trails in this field, or to even again mark out the lines. The aforementioned decisions not only point out the landmarks but they make plain the boundaries. The blazes are fresh and are before our eyes. Our object shall be to apply the law to the undisputed facts of this record." True it is, every case of this general type must depend on its own particcular facts, because situs can be determined by facts and these only. The notes in the instant case are taxable or not taxable depending upon whether or not they accrue out of or are incident to property owned or a business conducted by the non-resident owner, or his agent, in this State. In our statement of facts we have set out in full the allegations showing the procedure employed in making the loans involved from the time the borrower first contacted the broker in his effort to secure a loan to the time when it was actually closed and the note and loan deed forwarded to plaintiff lender at its home office. It would serve no useful purpose to again state those several acts incident to negotiating and closing the loans. If these allegations show the broker, or plaintiff's loan supervisor, or the firm of attorneys who closed the loan, or any two or more of them, was agent for plaintiff vested with authority in any manner to conduct for it a loan business in this State, then the petition did not state a cause of action for the relief prayed. *Suttles v. Northwestern Mutual Life Ins. Co.*, 193 Ga. *supra.* It was held by this court in *Davis v. Metropolitan Life Ins. Co., supra,* where an application for loan was made by a borrower through a broker as its agent and closed by a Trust Company, also an agent for the borrower, where procedure almost identical to that here employed was followed in making and closing the loan, that neither was a loan

agent of the lender, so as to give the credits involved a tax situs in this State. "By using intermediaries as channels of transmission for papers, relying upon their inspection of property and examination of titles, made at the borrower's instance, and forwarding the money through them also at his instance, the lender does not constitute them his agent to make the loan, and is not chargeable with the consequences of dealings between them and the borrower, whether those dealings be public or private, known or unknown." *Merck v. American Freehold etc. & Co.,* 79 Ga. 213 (2) (7 S. E. 265). In the *Merck* case Mr. Chief Justice Bleckley further said: "Implications of agency are easily over-strained, misapplied or otherwise abused . . . If he holds control of his capital and decides for himself when he will part with it, and on what terms, and has no terms but lawful interest and good security, and satisfies himself that the security is good, he transacts his own business and is not to be judged by the law of agency."

Applying the principles announced in very recent cases from this court, which we have cited, where efforts were made to tax credits where the loans were made under like procedure, we do not think the broker who accepted the loan application here involved or the attorneys who closed the loan were agents of the plaintiff, conducting for it such a loan business in this State as would give a tax situs to its loans so made. Both the broker and the attorneys who closed the loan were by express contract employed by the borrower as his agents to obtain and close the loan, and no services rendered by them in connection with the loan had the legal effect of changing the status of agency to one between them and the lender.

We therefore hold the allegations in the amended petition did not show the broker or the firm of attorneys who closed the loan were agents of the lender vested with authority to conduct a loan business for it in Georgia so as to make its credits taxable in this State. But what of the plaintiff's salaried loan supervisor Graf, and his connection with the loans? The allegations of the amended petition show his primary duty was to service the plaintiff's loans after they were made and upon authority of the Metropolitan case we hold "the maintenance of an office and agency in this State for the purpose merely of protecting the security and ultimate liquidation of the indebtedness, the papers themselves being sent into this State only when needed for collection, renewal or foreclosure, would not be using them in this State as an incident of property owned or of a business conducted in Georgia so as to give taxable situs here." Graf rendered no service to his employer in making the loans except to receive the application for a loan from the broker, inspect the property offered as security and transmit the application, together with his inspection report to the home office of the lender. With this done his entire connection with the application terminated. Unlike Durant in the Northwestern case, supra, he had no authority to solicit loans, and he never did, he had no contact or dealings with the borrower, he took no part in the preparation of papers connected with the loan, did not deal in any way with the attorneys who closed the loan, handled no part of the funds loaned, and no communication from the lender either with the borrower, the broker or the attorneys who closed it passed through his office. He was not present when and had no part in the preparation of the application for the loan or when it was approved by

plaintiff's finance committee. He took no part in making title investigations or in the preparation of the loan papers, neither was he present nor did he participate in any way with the closing of the loan. His employer did not rely upon him for any of these services in making its loans, but on the contrary trusted the agents of the borrower for this. We can not bring ourselves to believe that the services rendered by Graf in connection with plaintiff's loans were sufficient to show that it was conducting a loan business in this State through him as an agent so as to give a tax situs here for its credits.

We think the court properly found that the petition as amended stated a cause of action for the relief prayed and therefore did not err in overruling the general demurrer which was renewed to the petition as amended.

2. "Where there is no conflict in the evidence, and that introduced, with all reasonable deductions or inferences therefrom, shall demand a particular verdict, the court may direct the jury to find for the party entitled thereto." Code, Sec. 110-104. The stipulation between the parties and the evidence introduced by the plaintiff showed without dispute that the allegations contained in the petition as amended were true and as a matter of law they demanded a verdict for the plaintiff. It was therefore not erroneous for the court to direct the jury to find for the plaintiff as he did.

3. Complaint is made that the court excluded from evidence a bank book showing a special account maintained by Alston, Alston, Foster & Moise, the firm of attorneys who closed the loan here involved, in a named bank. It is insisted this evidence would have disclosed the

intangibles of the plaintiff were derived from or used as an incident of property owned or a business conducted by plaintiff in this State. We find ourselves unable to agree with defendants in this contention. The undisputed evidence shows that plaintiff in making the loan in question forwarded to the closing attorneys a check for the amount of the loan payable jointly to them and the borrower, with instructions to disburse the proceeds so that the loan being made would be a first lien on the property offered as security. The borrower endorsed the check to his agent, the closing attorneys, who deposited the same to their special account, without the knowledge or direction of the lender and immediately disbursed the funds for purposes of the loan. In these circumstances we are unable to understand how this evidence could have illustrated a taxable situs for plaintiff's loan in this State. It is sufficient to say this assignment is without merit.

It follows from what has been said in the three preceding divisions that the court did not err in overruling the general demurrer to the amended petition, and in refusing to grant a new trial.

Judgment affirmed. Chief Justice Jenks, Associate Justices Bell, Atkinson and Wyatt, and Judges Price and Townsend concur. Duckworth, P. J., and Head, J., disqualified.

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA

January 10, 1947.

I hereby certify that the foregoing pages hereto attached contain a true and complete copy of the opinion of the Supreme Court of Georgia in the case therein stated, as appears from the original of file in this office.

Witness my signature and the seal of said court hereto affixed the day and year above written.

K. C. BLECKLEY,
Clerk.